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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 04 2007

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an engineering and construction consulting firm. It seeks to employ the beneficiary permanently in the United States as a senior construction manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education required for classification as a member of the professions holding an advanced degree.

On appeal, counsel submits a brief and additional documentation. For the reasons discussed below, counsel's assertions are not persuasive in the context of the immigrant benefit sought.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The petitioner has not documented that the beneficiary possesses any academic credential. Rather, the petitioner relies on an evaluation of the beneficiary's experience alone concluding that the beneficiary has the equivalent of a Bachelor of Science degree in Construction Management plus an additional 18 years of experience. We acknowledge that the Form ETA 9089, Part H, line 8-B, allows for the substitution of experience for the required baccalaureate. At issue, then, are whether the beneficiary's experience alone can serve to meet the advanced degree requirement for the classification sought and whether the job requires a member of the professions with an advanced degree.

Eligibility for the Classification Sought

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone

unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).[1]

On appeal, counsel asserts that the beneficiary qualified for a nonimmigrant visa to fill the same position based on the evaluation supporting the petition. Counsel recounts the qualifications of the evaluator, which are not in dispute. Finally, counsel discusses the shortage of U.S. workers in the beneficiary's occupation.

Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* In this matter, we do not challenge the conclusions reached in the evaluation submitted. Rather, the conclusions do not establish that the beneficiary is eligible for the benefit sought.

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." On appeal, counsel relies on the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) which defines, for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree." This definition includes, in certain cases, a specific combination of education and experience. Counsel acknowledges that similar language does not appear in the regulation at 8 C.F.R. § 204.5(k), which relates the immigrant classification sought. Rather, counsel asserts that the differences between the nonimmigrant and immigrant regulations "are unconscionable in that they do not allow individuals the same opportunity under the law."

Counsel has not demonstrated that the regulation at 8 C.F.R. § 204.5(k) has been struck down by a competent authority. Thus, that regulation is binding on us. Moreover, that regulation is fully consistent with the legislative history of section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2). Specifically, the Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that *the alien must have a bachelor's degree* with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (October 26, 1990)(emphasis added).

In 1991, when the final rule at 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), now CIS, responded to criticism similar to

[1] *But cf. Hoosier Care, Inc. v. Chertoff*, 482 F. 3d 987 (7th Cir. 2007) relating to a lesser classification than the one involved in this matter and relying on the regulation at 8 C.F.R. § 204.5(l)(4), a provision that does not relate to the classification sought here.

that now raised by counsel regarding the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference quoted above, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991)(emphasis added).

Even if we could reconsider the plain language of the regulation at 8 C.F.R. § 204.5(k), and we reiterate that that language is binding upon us, counsel has not adequately explained why the beneficiary's eligibility for a nonimmigrant visa but not this *particular* immigrant visa is somehow "unconscionable." As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

Finally, counsel's assertion that there is shortage of workers in the beneficiary's occupation is not relevant to the issue of whether the beneficiary qualifies for a specific classification. The question of whether there is a shortage falls under the jurisdiction of DOL. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215, 221 (Commr. 1998). DOL has certified this position, including the alternative requirement of experience in lieu of a degree. Whether the beneficiary qualifies for a specific immigrant classification defined by Congress, however, falls under the jurisdiction of CIS. *See Tongatapu Woodcraft Hawaii,* 736 F. 2d at 1309; *Madany*, 696 F.2d at 1012-1013.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2).

Job Requirements

Beyond the decision of the director, the certified job does not require a member of the professions holding an advanced degree. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003). The AAO maintains

plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). *See also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability**.

(Bold emphasis added.)

CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Commr. 1986); *Madany*, 696 F.2d at 1015. *See also K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). CIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Madany*, 696 F.2d at 1015. The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). CIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

In this matter, Part H, line 4, of the labor certification reflects that a Bachelor's degree is the minimum level of education required. Lines 8-A and 8-B, however, reflect that a "Bachelor degree equivalent in experience" is also acceptable in the alternative.

As the job does not require, at a minimum, an academically earned baccalaureate, we cannot conclude that it requires a member of the professions holding an advanced degree.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. The denial of this petition, however, does *not* bar the filing of a new petition on behalf of the beneficiary under section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3), as a skilled worker with more than two years of training and experience.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.